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Liability for Manslaughter by Omission: Don't Let the Baby Drown!

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Abstract: By removing the common law rules on a duty to act from liability for manslaughter by omission, the law would more accurately reflect the intention of the House of Lords in R v Adomako (1995). The current duplicitous requirement of both a duty to act and a duty of care appears to be confusing both the trial judge and the jury. The causing of a harm by an omission does not automatically mean the conduct was less morally reprehensible than where harm is caused by an act and this reform would therefore potentially bring the law more closely into line with society's moral values. The law would be rendered clearer and simpler and injustices would be avoided due to the other requirements of the Law Commission's proposed offence of killing by gross carelessness, including causation and gross carelessness. Through this reform justice could at last be offered should a stranger choose to walk by a drowning baby.

Keywords Manslaughter; Omission; Gross negligence; Duty of care; Duty to act; Homicide

Criminal lawyers have long pondered over the rights and wrongs of imposing liability for an omission.¹ The moral tensions in the law are highlighted in the classic example of a stranger walking past a drowning baby.² The public outrage following the death of Baby P³ highlights how important it is that members of society recognise their duty to act to protect the vulnerable. The government has unexpectedly launched a major reform of the substantive criminal law⁴ and its eyes are currently focused on the law of homicide. Major reforms to the partial defences to murder have been included in the Coroners and Justice Act 2009, and the government has stated that consideration will also be given to the Law Commission's other recommendations regarding the homicide offences.⁵ This context makes it all the more important that the Law Commission's recommendations are the right way forward for the long-term future of the criminal law. While its proposals on homicide are generally very impressive and detailed,⁶ this is a broad area of law and this article will seek to highlight one particular issue which deserves further consideration. This issue is when liability should be imposed for manslaughter by omission. Following the case of *R v Lowe*,⁷ liability for an omission will not be imposed under the heading of constructive manslaughter, so the only possible basis for liability is at the moment gross negligence manslaughter and under the Law Commission's recommendations, killing by gross carelessness.⁸

The current law is unnecessarily restrictive and complicated by requiring both a duty to act under common law and a duty of care (defined according to civil law principles) before liability for manslaughter by omission will be applied. The requirement of this double duty is duplicitous and restrictive, posing an unnecessary obstacle for criminal liability in such cases. The critical issue should be whether a person owed a duty of care, criminal liability could then be imposed where the other elements of gross negligence manslaughter are satisfied, which could include where a member of the public walks past a drowning baby without offering assistance. Michael Moore has observed that liability for omissions should only be imposed for omissions 'that violate our duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails'.⁹ Thus, it comes down to a question of proportionality.¹⁰ Liability for an omis-

sion would not be justified against a stranger to the victim where only a small amount of harm was caused by the omission, but where that omission has caused a death it is appropriate for the criminal law to intervene. Criminal lawyers should no longer sit back and debate the legal and moral dilemma of the failure to rescue the drowning baby, and accept that change is overdue.

The current law

It is part of the established criminal law that liability for an omission will only be imposed where there is a duty to act. Various categories have been developed to determine whether there is such a duty to act (for example, a close family relationship,¹¹ the voluntary assumption of responsibility¹² and the creation of a dangerous situation¹³). In addition, in the case of *R v Adomako*¹⁴ the House of Lords stated that a defendant must owe a duty of care in order for liability for gross negligence manslaughter to be imposed. The case of *R v Khan and Khan*¹⁵ subsequently drew attention to the potential relevance of the old case law on omissions and the duty to act in the context of manslaughter by omission. Thus, it would seem that both a duty to act and a duty of care would need to be established in order for there to be liability for gross negligence manslaughter by omission. The potential impact of this double requirement is illustrated by a scenario where a stranger shares a hostel room with a drug addict. If she notices that the drug addict is showing the symptoms of an overdose but chooses to do nothing and the drug addict dies, she will not be liable for manslaughter. While a court might find that she owed the drug user a duty of care because it was reasonably foreseeable that by her omission the victim would suffer harm, she would not be under any duty to act because her relationship with the drug user does not fall within any of the categories in which a duty to act would be imposed. This article argues that the legal requirement of a duty of care serves a valid purpose, but the additional requirement of a duty to act is an unnecessary restriction on liability, placing an undue emphasis on individual autonomy at the expense of social responsibility and moral values.

The concepts of a duty to act and a duty of care have proved problematic in their own right, a problem which is then aggravated by the requirement that both these concepts be established to impose liability for gross negligence manslaughter by omission. Looking first at the common law rules on the existence of a duty to act, these have been the subject of significant academic criticism.¹⁶ They are narrow in practice and have proved difficult to state with certainty,¹⁷ to the point that the Law Commission decided it would be impossible to codify these rules for the purposes of the draft Criminal Code.¹⁸ The Commission observed:

It is extremely unsatisfactory that the law should remain uncertain in this important area.... If the top lawyers in a Government committee find the law hard to state clearly, what hope have the Stones and Dobinsons of this world of ascertaining their legal position, in advance of prosecution, when they find themselves landed with a hunger-striking relative?¹⁹

It went so far as to suggest that the law in this area fails to meet the standard of certainty required by the European Convention on Human Rights.²⁰ The House of Lords itself has acknowledged that this area of law lacks certainty, with Lord Mustill observing in *Airedale NHS Trust v Bland*²¹ 'precisely in what circumstances such a duty should be held to exist is at present quite unclear'.²²

The courts openly favour the incremental development of relationships which can give rise to a duty to act,²³ despite the fact that this inevitably leads to increased uncertainty. The Court of Appeal in *R v Sinclair*²⁴ recognised the risk that there could be 'such elasticity in that expansion that potential defendants are unaware until after the event whether their conduct is capable of being regarded as criminal'.²⁵

As regards the meaning of a duty of care for the purposes of gross negligence manslaughter, this has been explored in detail by Jonathan Herring and Elaine Palser.²⁶ When *Adomako*²⁷ was first decided the meaning of a duty of care in this context caused some confusion.²⁸ It is now relatively clear that it has its ordinary civil meaning as developed in the law of negligence. Thus a person owes a duty of care to another where it is reasonably foreseeable that their acts or omissions will cause harm to another. The Court of Appeal has recently clarified in *R v Evans*²⁹ that the meaning of a duty of care is an issue of law determined by the judge, with the jury deciding whether the facts of the case fall within that legal definition.³⁰ The problems in trying to apply civil law concepts to criminal law offences was highlighted in the case of *R v Wacker*.

... the very same public policy that causes the civil courts to refuse the claim points in quite different directions in considering a criminal offence. The criminal law has as its function the protection of citizens and gives effect to the state's duty to try those who have deprived citizens of their rights of life, limb or property. It may very well step in at the precise moment when civil courts withdraw because of this very different function. The withdrawal of a civil remedy has nothing to do with whether as a matter of public policy the criminal law applies. The criminal law should not be disapplied just because the civil law is disapplied. It has its own public policy aim which may require a different approach to the involvement of the law.³¹

Turning to the interrelationship between the duty to act and the duty of care, where the common law duty to act arises it would generally also be reasonably foreseeable that harm would result from the defendant's acts or omissions because of the closeness of the relationship between the parties. But not every person who can foresee that his failure to act would cause harm to the victim, would have a close enough relationship to the victim to give rise to the common law duty to act, the classic example being the stranger who walks past a baby drowning. If a stranger to the victim created the original dangerous situation then the case of *Miller*³² can be applied to find a duty to act.³³ This was the situation in *Evans*³⁴ where the appellant was the elder half-sister of the victim. She had supplied the victim with heroin, and after the victim had injected herself with the drug, the victim had shown signs of overdosing. The appellant had recognised those signs but had been frightened to call for medical assistance in case she or the victim got into trouble. She therefore put the victim to bed, wiped water on her face to cool her and hoped that she would sleep it off. In the morning the victim was dead. Following the case of *R v Kennedy (No. 2)*³⁵ a prosecution for constructive manslaughter could not succeed because the requirement of causation would not be satisfied. Instead the appellant was successfully prosecuted for gross negligence manslaughter and her appeal dismissed. A duty to act was found relying on the case of *Miller*.³⁶

However, if the defendant did not create the original dangerous situation, the requirement of a duty to act may prevent the imposition of criminal liability where the defendant is not a close relative to the victim. For example, if an adult is in a park and sees a child he does not know become dangerously entangled in some playing equipment, he might have a duty of care to that child but there would be no duty to act under the common law.

The confusion between a duty of care and a duty to act

In practice, the distinction between the duty of care and the duty to act is often not drawn by the courts and sometimes the duty to act is referred to as a 'duty to care'³⁷ or even as a 'duty of care'.³⁸ This confusion is particularly problematic as, following the case of *Evans*,³⁹ the trial judge must direct the jury on the legal meaning of both a duty of care and a duty to act so that the jury can then apply the facts of the case to those legal definitions to determine whether both those forms of duty exist in a relevant case of manslaughter by omission. The task of the jury will not be facilitated if trial judges are themselves blurring these two concepts. In *Evans*, the judgment continues the confusion between a duty of care and a duty to act by frequently grouping the two concepts together rather than clearly distinguishing them. Thus, in explaining the direction given by the trial judge to the jury, the Court of Appeal slides from a discussion of the duty to act to a reference to a duty of care without apparently noting the legal significance of this transition:

He [the trial judge] directed the jury that before they could convict on manslaughter by omission, 'there must be a pre-existing *duty to act* ...

The judge told the jury that he would direct them 'as to the circumstances in which *such a duty* can arise as a matter of law' but it would be for the jury to decide whether, on the facts they found, either or each of the defendants owed *such a duty* towards the deceased. In the case of the appellant he directed the jury that as a matter of law the blood relationship between the appellant and her half sister, who was a minor, did not of itself give rise to a *duty of care*.⁴⁰

When explaining the reasoning of the Court of Appeal for rejecting the appellant's appeal, the Lord Judge CJ states:

In those cases, such as those arising from a doctor/patient relationship where the existence of the duty is not in dispute, the judge may well direct the jury that a *duty of care* exists ... In any cases where the issue is in

dispute, and therefore in more complex cases, and assuming that the judge has found that it would be open to the jury to find that there was a *duty of care*, or a *duty to act*, the jury should be directed that if facts a + b and / or c or d are established, then in law a *duty* will arise, but if facts x or y or z were present, the *duty* would be negated.⁴¹

While some parts of the judgment make a clear reference to both a duty of care and a duty to act⁴² other parts of the judgment identify a duty of care using reasoning which looks more closely aligned to the common law for the finding of a duty to act and the two concepts are effectively blurred together as one. Thus, the Court of Appeal stated that there is nothing in the appellant's conduct 'capable of amounting to an acceptance or an assumption of responsibility' so as to give rise to 'a duty of care', so the Court of Appeal is applying the law relating to a duty to act, but as if it determines the existence of a duty of care.⁴³ Two paragraphs later, the court reverts to describing this (correctly) as a duty to act.⁴⁴

This confusion has continued with the academic analysis of the case, with Glenys Williams⁴⁵ interpreting *Evans* as requiring a single duty of care established on the basis of *Miller*.⁴⁶ This interpretation of the case blurs what at the moment are actually two separate legal issues. It treats *Miller* as a case used to interpret the duty of care for gross negligence manslaughter and as a result fails to recognise that the *Miller* test for omissions liability amounts to an additional requirement on top of the requirement for a duty of care.

In *Sinclair*⁴⁷ the appeal was argued on the basis that the defendants did not owe a duty of care to the victim, but the main case referred to support this argument was *Stone and Dobinson*.⁴⁸ It therefore seems that what was actually being referred to was the duty to act.

The duty of care/duty to act distinction is an issue which is causing the jury some difficulties. The trial judge in *Sinclair* ruled that 'it was for the jury to decide whether the defendants had voluntarily assumed the care of the deceased so as to assume a legal duty of care to him'. Rather unsurprisingly, the Court of Appeal note:

It is apparent that the jury were troubled by this aspect of the case, because they returned with a question seeking further guidance about the legal duty of care about which they said they were 'unsure'.⁴⁹

While in *Khan and Khan*⁵⁰ and *Evans*⁵¹ the Court of Appeal makes express reference to the duty to act cases in common law, the majority of cases involving gross negligence manslaughter by omission are more ambiguous on the issue. The Court of Appeal in *Singh*⁵² was concerned with an omission, but made no reference to *Khan and Khan* or the common law cases on a duty to act. There is no reference to such cases in *R v Clothier*⁵³ either, despite the fact that the crux of the prosecution case was that the defendants had failed to maintain a tractor, thereby rendering it dangerous. While in *Wacker*⁵⁴ (a case involving the tragic deaths of illegal Chinese immigrants in the defendant's lorry) the Court of Appeal did raise the question of whether closing the vent and/or not opening it again might best be classified as an act or omission, but it did not feel it necessary to make a clear finding on this issue.⁵⁵ Though a passing reference to a failure to act might suggest it was considered to be an omission,⁵⁶ the court does not make any direct reference to the common law cases on duties to act, stating that it had:

no difficulty in concluding that in these circumstances the defendant did voluntarily assume the duty of care for the Chinese in this regard. He was aware that no one's actions other than his own could realistically prevent the Chinese from suffocating to death ...⁵⁷

This would appear to be an oblique reference to the 'assumption of responsibility' criterion for the imposition of a duty to act.

In *R v Brian Dean*⁵⁸ the jury was instructed that criminal liability could be imposed for gross negligence manslaughter on the basis of either an act or an omission, with the assumption that it would make no difference to the law that was applied. In considering the defendant's appeal against conviction, the Court of Appeal explained that:

the jury had to be sure of the following: (1) that the appellant owed a duty of care to his employees, Michael and Carl Redgate; (2) that he was in breach of that duty by failing to warn them that it was dangerous to remove the buck stays before demolishing the brickwork; (3) that that breach of duty caused the death of the two Redgates; and (4) that the breach of duty amounted to gross negligence.⁵⁹

No reference was made to the duty to act, though this could be explained on the ground that the duty to act is well established between an employer and employee. Ultimately the jury convicted on the basis of an omission--that the defendant had failed to warn his employee of the danger of removing buck stays before the brickwork was demolished when preparing a kiln for demolition.

Finally, in *R v Willoughby*⁶⁰ the court failed to identify whether the victim's death was caused by an omission (failing to protect the safety of the victim) or a positive act (lighting the petrol). As a result, again, no reference is made to the common law cases on the subject.⁶¹

An alternative interpretation

While the approach taken in *Khan and Khan*,⁶² requiring both a duty to act and a duty of care for gross negligence manslaughter by omission, seems to have gained acceptance by the courts⁶³ and academics,⁶⁴ the House of Lords judgment of *Adomako*⁶⁵ explaining the law on gross negligence manslaughter could have been interpreted differently. *Adomako* itself can be viewed as a case involving liability for an omission, as an anaesthetist failed to reconnect an oxygen tube when it became disconnected during an operation. Yet the House of Lords judgment makes no reference at all to the common law cases on the existence of a duty to act. Lord MacKay simply stated:

The essence of the matter, which is supremely a jury question, is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or *omission*.⁶⁶

It could be argued that this failure to make a direct reference to the common law cases on a duty to act was simply because the duty to act between doctors and patients was clearly established in the law and therefore needed no further discussion. An alternative interpretation of *Adomako* could have been that the duty of care required for the imposition of liability for gross negligence manslaughter by either an act or an omission, incorporates the duty to act. There would then be no need to find two separate duties--the duty of care and the duty to act--where the facts of the case amount to an omission. By requiring evidence of two duties, the law is unnecessarily complicated and inappropriately restrictive regarding the imposition of liability for an omission which leads to a death. A requirement that where the death was caused by an omission, defendants will only be liable for manslaughter if they owed a duty to act under common law, must be intended to restrict further the range of people who can be liable for this offence. But, as will be argued below, this restriction risks injustice in allowing culpable individuals to take no responsibility for their conduct: it is the fact that harm was reasonably foreseeable (for the purposes of a duty of care) which establishes a factual situation which could be as culpable as if a positive act had been carried out by the defendant.

The Law Commission's recommendations

The Law Commission's draft code preserves the common law on omissions.⁶⁷ It commented that:

the present law has been the subject of much criticism, and we consider that it would not be appropriate for it to be codified without reform.⁶⁸

As the Law Commission's final recommendation was that the criticised common law should remain in force, this seems particularly unsatisfactory.⁶⁹ In the ideal world the Law Commission would like to consider liability for omissions in the context of a discrete law reform project 'when resources and competing priorities permit',⁷⁰ but it would be a shame to legislate an unsatisfactory reform for involuntary manslaughter for want of this opportunity. While the Law Commission has recommended some significant reforms to the law of murder and voluntary manslaughter, its recommendations in relation to involuntary manslaughter are less radical. With regard to gross negligence manslaughter the Commission's most recent report on the reform of the homicide offences⁷¹ refers back to its earlier recommendation in 1996.⁷² The relevant offence would be defined in the following terms:

- (1) a person by his or her conduct causes the death of another;

- (2) a risk that his or her conduct will cause death would be obvious to a reasonable person in his or her position;
- (3) he or she is capable of appreciating that risk at the material time; and
- (4) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances.⁷³

The draft Homicide Bill prepared by the Law Commission in 1996 and referred to on this subject with approval in the more recent Law Commission papers on homicide,⁷⁴ included a further provision regarding liability for an omission, which the Law Commission appears to intend to retain. This states:

A person is not guilty of an offence under sections 1 or 2 above by reason of an omission unless the omission is in breach of a duty at common law.⁷⁵

Thus, the Law Commission suggests liability should be imposed for both acts and omissions, but that liability for an omission should only be applied where the common law rules on the existence of a duty to act are satisfied. Therefore, like the draft Criminal Code Bill, the Commission would keep the existing common law rules in this area, not because it considers them particularly successful or effective in achieving justice, but because it regards them as so unclear that they would be difficult to codify accurately, and because the issues raised with regard to liability for omissions are too substantial to be considered within the constraints of its review of involuntary manslaughter.⁷⁶

Parliament has already shown a willingness to criminalise omissions which contribute to a death, through the creation of a new offence in the Domestic Violence, Crime and Victims Act 2004. This offence is committed where a victim in the defendant's household was or should have been aware that the victim was at significant risk of serious physical harm and failed to take reasonable steps to prevent the death.⁷⁷ It was under this offence that the carers of Baby P were convicted.⁷⁸ In *R v Khan*,⁷⁹ members of the same household as the victim who was killed by her husband were held liable for failing to take reasonable steps to prevent her death. They had witnessed several incidents of serious domestic abuse in the weeks before the victim's death. Their appeals against conviction under s. 5 of the 2004 Act were dismissed, even though the final attack had taken place away from the home in the garage and involved more significant violence than the previous incidents.

The Law Commission would remove the notion of a 'duty of care' and replace it with the test of whether it would have been obvious to a reasonable person in the defendant's shoes that the conduct involved a risk of death.⁸⁰

The removal of the cross-reference to civil law would have the benefit of maintaining the emphasis on whether there was an obvious risk of death, while avoiding the complications of directly cross-referring to the civil law. In particular, alongside the duty of care laid down in negligence, there are restrictions on where liability will be imposed for an omission in civil law, which are strikingly similar to those laid down in criminal law.⁸¹ A defence lawyer could not argue under the proposed new offence that these civil limitations should apply to the offence of killing by gross carelessness.

The floodgates will hold

It is disappointing that the Law Commission, like the courts, is not ready to let go of the common law rules on omission in the context of killing by gross carelessness. This reluctance may reflect an anxiety that the imposition of a general liability for omission could open up the floodgates with potentially large numbers of the public being exposed to the risk of prosecution and conviction for a very serious offence. However, the fact that a death has been caused cannot be ignored; it is central to the question of whether criminalisation is required and a justification for distinguishing manslaughter by omission from other offences committed by omission. The relevance of the gravity of the harm to the decision whether to criminalise an omission was acknowledged by the Criminal Law Revision Committee which recommended that liability for omissions in

the sphere of offences against the person should be confined to the more serious offences⁸² As Grant Lamond has pointed out:

The strength of the reason in favour of punishment will depend upon the overall gravity of the wrong, which depends in turn on the importance of the interest or value at stake, the degree of violation (or risk of violation) that the wrong created, and the kind of disrespect shown by the wrongdoer.⁸³

To ignore the harm and focus on the omission as a basis for refusing the application of the criminal law leads to the criminalisation of the person who steals the baby's dummy, but not if he lets the baby drown.⁸⁴

With the passing of the Human Rights Act 1998, the right to life guaranteed by Article 2 of the European Convention must also be borne in mind.⁸⁵ This imposes a positive obligation on the State which would be breached if the criminal law did not adequately protect this right. In other words, by potentially ignoring deaths caused by an omission, Article 2 could be violated. The civil law on omissions has been forced to shift in the light of the European Convention⁸⁶ and it would be wise for any reforms to the English law of homicide to take this into account. The right to life is so fundamental that it should have additional protection over and above the right to, for example, property and this protection must extend to where this loss of life is caused by the omission of a stranger, not just omissions by the narrow range of people treated in common law as owing a duty to act. Philippa Foot has suggested that a failure to come to the rescue is merely contrary to the virtue of charity which will not give rise to legal rights, but in the UK the right to life is respected by the European Convention on Human Rights and this must be legally relevant.⁸⁷

By removing the specific requirement of a duty to act in the context of manslaughter, there is no risk of opening the floodgates to limitless liability because the offence itself already has built within it important restrictions. Liability will only be imposed if there was an obvious risk of death, the death was caused by the defendant, and he or she was grossly careless. The failure to act may be due to a wide range of reasons, such as miscalculation, momentary inattentiveness or clumsiness,⁸⁸ but the omission will only be criminalised if the defendant's conduct falls far below what can reasonably be expected in the circumstances. Thus in determining whether a person has been grossly careless, a court could take into account the defendant's physical proximity to the victim, whether a rescue attempt would have been dangerous for the defendant, whether the victim wanted to be rescued and whether the defendant had the capacity to carry out a rescue.

One of Glanville Williams' objections to liability for omissions is that:

I cannot be made criminally responsible when I knowingly fail to save (and do not even try to save) the lives of unfortunate inhabitants of the Ganges delta who are drowned in floods; yet I could do something to help them by selling my house and giving the money to a suitable charity.⁸⁹

This example highlights that in criminalising omissions, limits in time and space must be applied and these limits will be applied through the requirements of an obvious risk of death, gross carelessness and causation, there is no need for the additional requirement of a duty to act.

Omissions in a modern society

To determine whether the law took a wrong turning in the case of *Khan and Khan*,⁹⁰ which should not be followed by the Law Commission, consideration needs to be given to the fundamental question of whether liability for an omission should be more restrictive than for an act and, if so, what level of restrictions are required. When a stranger leaves a baby to drown, this would appear to be potentially a 'perfect moral fault' as identified by Samuel Freeman.⁹¹ He considers that a 'perfect moral duty' to give emergency assistance to aid those who are about to suffer a great physical or mental injury existed when:

- (a) we have the clear opportunity and are in a privileged position to give aid;
- (b) we have knowledge of their jeopardy and knowledge of the means necessary to relieve it;
- (c) we have the ability to directly relieve their distress by immediate and well-circumscribed action; and

- (d) we can do so at negligible risk, minimal costs and at little inconvenience to ourselves.⁹²

He argues persuasively that there are no convincing reasons why this perfect moral duty should not be enforced by the criminal law.

The most self-interested of persons can be motivated to rescue a drowning infant in a ... pool at little costs to his freedom of action, so long as there are sufficient sanctions--positive or negative--in place to induce that conduct.⁹³

In the case of the drowning baby scenario, it is true that the only thing that links the stranger to the death of the baby is his chance presence at the scene.⁹⁴ While there is an element of bad luck for the stranger, the fact is that he was present at the scene and there is no justification for the law to ignore this factual reality completely. This moral duty to save the baby can be effectively enforced in English criminal law by the offence of gross negligence manslaughter where the potential victim risks being killed. The factors Freeman lists in determining the existence of the moral duty are all factors which would be relevant in determining whether a defendant had a duty of care and whether his omission was grossly negligent--looking for the common law duty to act is an artificial restraint on this 'perfect moral duty'.

Law and morality seemed to be moving closer with regard to deaths by omission with the judgment of Lord Coleridge in *R v Instan*⁹⁵ at the end of the 19th century, but the courts have refused to accept Lord Coleridge's lead, and law and morality as a result have parted ways.⁹⁶ While law and morals do not always need to correlate, they should not veer too widely apart without good reason, particularly where those moral values have a logical foundation based on social responsibility and the reduction of harm. In the civil law context, the courts have been willing to acknowledge that legal policy can be legitimately influenced by community morals and expectations.⁹⁷ Lord Steyn commented that in difficult cases:

a judge is entitled to rely on what he reasonably believes the ordinary citizen would regard as right, and that the judges sense of the moral answer to a question ... has been one of the great shaping forces of the common law.⁹⁸

In the criminal law context, Kay LJ in *Wacker*⁹⁹ was clearly concerned with the moral views of the public, in saying that 'all right-minded people would be astonished if the propositions being advanced on behalf of the defendant correctly represented the law of the land'.¹⁰⁰

Michael Moore has argued that acts that violate negative duties are of greater moral significance than omissions that violate their positive counterparts.¹⁰¹ Thus, killing is worse than letting someone die, and stealing is worse than allowing another to steal from a third party. But it does not follow that letting someone die is always worse than stealing.¹⁰² This relative moral significance of positive duties compared with negative duties is the justification for seeking criminal liability for manslaughter rather than murder where the omission is by a stranger to the victim. Where a moral distinction is seen between killings resulting from an act or an omission, this distinction seems primarily to be because of the associated difference in the *mens rea* of the defendant--an act is more likely to involve intention while an omission is more likely to involve negligence. It is therefore preferable for the law to distinguish these different forms of involvement through the *mens rea* threshold of the offences, rather than by tightening the *actus reus* requirements for omissions.¹⁰³ While in the context of murder, the offence is so bluntly defined that the reliance on the exceptions for an omission can be central to achieving justice, in the context of manslaughter there are other restrictions on liability, mentioned above, which will ensure that injustice is avoided.

Glanville Williams¹⁰⁴ pointed out that medical ethics draw a fundamental moral distinction between killing and letting die (in breach of duty).¹⁰⁵ This moral distinction can, however, be reflected in the other requirements for gross careless manslaughter, rather than falling back on the absence of a duty to act to give rise to liability for an omission. If the proposed reforms were introduced, the doctors in Anthony Bland's case¹⁰⁶ would still not be liable for murder as the proposed changes will only have an impact on involuntary manslaughter. Nor will they be liable for killing by gross carelessness because their conduct could not be found to be grossly careless to the point that it justifies criminal liability.

Generally, in terms of the definition of the fatal offences the *modus operandi* is irrelevant until the point of sentencing is reached--an offence is still murder or manslaughter regardless of whether a knife, gun or poi-

son was used for the killing. The moral irrelevance of the *modus operandi* should not be forgotten when the killing is caused by an omission. What is central to liability for an omission is not the personal or contractual relationship between the defendant and the victim, but the fact that the defendant made a voluntary choice not to act to, for example, rescue the victim. If the defendant had been asleep at the time of the death and unaware of the circumstances leading to the death then there would be no question of describing him or her as 'omitting to rescue'. A failure to act will only be treated as an omission if the defendant had the opportunity and ability to act, was aware that he had the opportunity and ability, and the act was reasonably expected of him.¹⁰⁷ As George Fletcher has observed 'the only kind of omitting that is interesting is the kind in which human agency is expressed'.¹⁰⁸ The significance of the *actus reus* of any offence is that a person has behaved voluntarily as this means that he was able to make a choice to go ahead and commit the crime or not.¹⁰⁹ Whether this voluntary choice manifests itself in the form of an act or an omission is irrelevant.

In determining when liability for an omission should be imposed, Andrew Ashworth has contrasted the 'conventional view' with the 'social responsibility' view.¹¹⁰ He argues that the former prioritises social autonomy and liberty whereas the latter emphasises the duties of citizens in a healthy society. He favours the latter approach to justify a wider imposition of liability for omissions.¹¹¹ The imposition of liability for the omission is justified because of the interdependence of individuals in a functioning and healthy society--such liability should not therefore be restricted to blood relations or formal legal relations.¹¹² Such arguments are all the more convincing at a time when excessive individual freedom is being identified as a cause of the current economic crisis and state intervention to restrict such freedoms is being seen as a necessity.

By contrast, Glanville Williams has argued forcefully in support of the common law, conventional view.¹¹³ However, the common law rules date back to an era when 'private selfishness was elevated to the rank of a public virtue'.¹¹⁴ In the context of a modern society where the majority of adults walk around with mobile phones in their pockets, it would not be too onerous a burden on members of the public to require them to request assistance to a person in peril, even if they should not be inclined, or able, to provide the assistance themselves. Perhaps a reluctance to impose such a duty was understandable in the past when means of communication were more limited, but totally unjustifiable in a modern society where communication systems are easily accessible and where the emergency and social services are well developed.

Reform

When legislating the Law Commission's recommendations on involuntary manslaughter, the reference to the common law on omissions should be deleted so that it would no longer be necessary to prove a separate duty to act for manslaughter by omission. The removal of the common law rules would only have an impact on the offence of manslaughter and these rules would continue to apply to other offences. Alongside this amendment to the proposed reforms, two statutory defences should be included which would provide adequate protection for those prosecuted for manslaughter by omission. The first of these defences would provide that where the defendant's conduct amounted to an omission, he would not be liable for manslaughter if a reasonable attempt had been made to contact the emergency or social services. The second defence could be modelled on s. 50 of the Serious Crime Act 2007, which provides a statutory defence to the inchoate offences of assisting or encouraging a crime,¹¹⁵ as follows:

- (1) A person is not guilty of an offence under this section if he proves--
 - (a) that he knew or believed certain circumstances existed; and
 - (b) that it was reasonable for him to act or omit to act as he did in those circumstances.
- (2) Factors to be considered in determining whether it was reasonable for a person to act as he did include--
 - (a) the seriousness of the anticipated offence;
 - (b) any purpose for which he claims to have been acting or omitting to act;

- (2) (c) any authority by which he claims to have been acting or omitting to act.

This defence would recognise that a person can only be expected to act within the limits of his own personal capacity, a limitation which is already recognised in the existing common law rules where a duty to act is imposed.¹¹⁶

The fact that the offence was committed by an omission could be taken into account at the point of sentencing. The judges already, on occasion, draw a distinction between sentencing for gross negligence manslaughter by an act and gross negligence manslaughter by an omission. In *R v Horry and Horry*,¹¹⁷ the Lord Chief Justice stated:

It is a trite observation that the appropriate sentence for manslaughter is more widely variable than perhaps any other offence. But we have to bear in mind that a sentence must be related to the criminality of a defendant's conduct and not be determined by the outcome of that conduct alone, however catastrophic. This was a case of gross negligence by pure omission.¹¹⁸

Therefore, if on the facts of a case the omission suggests that the offence was less serious than certain other forms of manslaughter, this can be reflected in the sentence given.

In conclusion, by removing the common law rules on a duty to act from liability for manslaughter by omission, the law would more accurately reflect the intention of the House of Lords in *Adomako*.¹¹⁹ The current duplicitous requirement of both a duty to act and a duty of care appears to be confusing both the trial judge and the jury. Causing a harm by an omission does not automatically mean the conduct was less morally reprehensible than where a harm is caused by an act and this reform would therefore potentially bring the law more closely into line with society's moral values. The law would be rendered clearer and simpler and injustices would be avoided due to the other requirements of the Law Commission's proposed offence of killing by gross carelessness, along with the availability of suggested new statutory defences. Through this reform justice could at last be achieved should a stranger choose to walk by a drowning baby.

¹ See, e.g., A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 LQR 424; G. L. Williams, 'Criminal Omissions--the Conventional View' (1991) 107 LQR 86.

² J. F. Stephen, *Digest of the Criminal Law*, 4th edn (Macmillan: London, 1887) art. 212.

³ A. Fresco, 'After 17 months of unimaginable cruelty Baby P finally succumbed', *The Times*, 12 November 2008; 'Timeline: the short life of Baby P', *Guardian*, 11 November 2008.

⁴ The Fraud Act 2006 has enacted new fraud offences; the Corporate Manslaughter and Corporate Homicide Act 2007 has been passed after a lengthy period of negotiations; the common law offence of incitement has been abolished and replaced by the statutory offences of assisting and encouraging an offence in the Serious Crime Act 2007.

⁵ Justice Minister Maria Eagle issued a ministerial statement on 12 December 2007 stating: 'The Government believes it is right to deal with these crucial elements of the existing law before moving on to consider the wider structural proposals from the Law Commission'; see also Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, Consultation Paper CP 19/08, 28 July 2008, 1: '... we have decided to look first at the [recommendations] that we think touch on the areas of most pressing concern', available at <http://www.justice.gov.uk/consultations/docs/murder-manslaughter-infanticide-consultation.pdf>, accessed 12 February 2010.

⁶ Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com. No. 237 (1996); *A New Homicide Act for England and Wales?*, Law Com. Consultation Paper No. 177 (2005); *Murder, Manslaughter and Infanticide*, Law Com. No. 304 (2006).

⁷ [1973] QB 702.

- ⁸ Law Com. No. 304 (2006), above n. 6 at Part 9.
- ⁹ M. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Oxford University Press: Oxford, 1993) 59.
- ¹⁰ G. Mead, 'Contracting into Crime: A Theory of Criminal Omissions' (1991) 11(2) OJLS 171.
- ¹¹ *R v Lowe* [1973] QB 702.
- ¹² *R v Stone and Dobinson* [1977] QB 354.
- ¹³ *R v Miller* [1983] 2 AC 161; *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999.
- ¹⁴ *R v Adomako* [1995] AC 171.
- ¹⁵ [1998] Crim LR 830; see also *Airedale NHS Trust v Bland* [1993] AC 789 at 893.
- ¹⁶ Ashworth, above n. 1; Williams, above n. 1.
- ¹⁷ Law Com. Working Paper 135 (1994) and Law Com. No. 237, para. 2.22.
- ¹⁸ Law Commission, *A Criminal Code for England and Wales*, Law Com. No. 177 (1989) vol. 2, paras 7.9-7.13; Williams, above n. 1.
- ¹⁹ Law Com. No. 237, para. 3.16.
- ²⁰ Ibid. at para. 3.16; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Kokkinakis v Greece* (1994) 17 EHRR 397 at [52]; *R v Misra and Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App R 21.
- ²¹ [1993] AC 789.
- ²² Ibid. at 893.
- ²³ See, e.g., *R v Sinclair* [1998] EWCA Crim 2590, (1998) 148 NLJ 1353.
- ²⁴ [1998] EWCA Crim 2590, (1998) 148 NLJ 1353.
- ²⁵ Ibid. at [18].
- ²⁶ J. Herring and E. Palser, 'The Duty of Care in Gross Negligence Manslaughter' [2007] Crim LR 24.
- ²⁷ [1995] 1 AC 171.
- ²⁸ C. Elliott, 'Recent Developments in the English Law of Involuntary Manslaughter' [1995] *European Journal of Crime, Criminal Law and Criminal Justice* 272. See also S. Gardner, 'Manslaughter by Gross Negligence' (1995) 111 LQR 22 at 23.
- ²⁹ [2009] EWCA Crim 650, [2009] 1 WLR 1999.

³⁰ [2009] EWCA Crim 650, [2009] 1 WLR 1999 at [39]. This issue had originally been identified by Herring and Palser, above n. 26.

³¹ *R v Wacker* [2002] EWCA Crim 1944, [2003] QB 1207 at [33].

³² [1983] 2 AC 161.

³³ *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999 at [21].

³⁴ [2009] EWCA Crim 650.

³⁵ [2007] UKHL 38, [2008] 1 AC 269.

³⁶ [1983] 2 AC 161.

³⁷ Law Com. No. 237, para. 2.23.

³⁸ *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999 at [45].

³⁹ *Ibid.*

⁴⁰ Above n. 38 at [33]-[34] (emphasis added).

⁴¹ *Ibid.* at [45] (emphasis added).

⁴² For example, *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999 at [39].

⁴³ *Ibid.* at [34].

⁴⁴ *Ibid.* at [36].

⁴⁵ G. Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: *R. v Evans*' [2009] Crim LR 631.

⁴⁶ [1983] 2 AC 161.

⁴⁷ [1998] EWCA Crim 2590, (1998) 148 NLJ 1353.

⁴⁸ [1977] QB 354.

⁴⁹ [1998] EWCA Crim 2590 at [16].

⁵⁰ [1998] Crim LR 830.

⁵¹ [2009] EWCA Crim 650, [2009] 1 WLR 1999.

⁵² [1999] CLR 582.

⁵³ [2004] EWCA Crim 2629.

⁵⁴ [2003] QB 1207.

⁵⁵ Ibid. at 1215. See on this subject Herring and Palser, above n. 26 at 33.

⁵⁶ [2003] QB 1207 at 1218.

⁵⁷ [2003] QB 1207 at 1218.

⁵⁸ [2002] EWCA Crim 2410.

⁵⁹ [2002] EWCA Crim 2410 at [11].

⁶⁰ [2004] EWCA Crim 3365, [2005] 1 WLR 1880.

⁶¹ See on this subject Herring and Palser, above n. 26 at 33.

⁶² [1998] Crim LR 830.

⁶³ See, e.g., *R v Evans* [2009] EWCA Crim 650, [2009] 1 WLR 1999 and *R v Ruffell* [2003] EWCA Crim 122, [2003] 2 Cr App R (S) 53.

⁶⁴ Herring and Palser, above n. 26.

⁶⁵ [1995] AC 171.

⁶⁶ [1995] AC 171 at 187 (emphasis added).

⁶⁷ Law Com. No. 304, para. 7.13. Clause 4(4) of the draft Criminal Code Bill.

⁶⁸ Law Com. No. 237, para. 5.43.

⁶⁹ Williams, above n. 1 at 97.

⁷⁰ Law Com. No. 237, para. 5.44.

⁷¹ Law Com. No. 304 (2006).

⁷² Law Com. No. 237, para. 3.9. See on this subject H. Keating, 'The Law Commission Report on Involuntary Manslaughter: The Restoration of a Serious Crime' [1996] Crim LR 535.

⁷³ Law Com. No. 304, paras 3.60 and 9.13.

⁷⁴ Law Com. Consultation Paper No. 177.

⁷⁵ Law Com. No. 237, Appendix A, cl. 3.

⁷⁶ Ibid. at para. 3.14.

⁷⁷ Domestic Violence, Crime and Victims Act 2004, s. 5.

⁷⁸ Law Com. No. 304.

⁷⁹ [2009] EWCA Crim 2; [2009] 4 All ER 544.

⁸⁰ Law Com. Consultation Paper No. 177, para. 5.41. See on this subject Herring and Palser, above n. 26. They have argued that a duty of care approach would be preferable to a reasonable foreseeability approach.

⁸¹ K. Williams, 'Medical Samaritans: Is There a Duty to Treat?' (2001) 21(3) OJLS 393; *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241, 271; *Stansbie v Troman* [1948] 2 KB 48; *Haynes v Harwood* [1935] 1 KB 146.

⁸² Criminal Law Revision Committee, *Offences Against the Person*, 14th Report, Cmnd 7844 (1980) 108-10.

⁸³ G. Lamond, 'What Is a Crime?' (2007) 27(4) OJLS 609.

⁸⁴ S. Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 U Pa L Rev 1455 at 1463.

⁸⁵ J. McBride, 'Protecting Life: A Positive Obligation to Help' (1999) 24 EL Rev HR 43.

⁸⁶ *Osman v United Kingdom* [1999] 1 FLR 193; *Z v United Kingdom* (2001) 34 EHRR 3; *Hertfordshire Police v Van Colle* [2008] UKHL 50.

⁸⁷ P. Foot, 'Euthanasia' (1977) 6 Phil & Pub Aff 85 at 96, discussed by F. M. Kamm, 'Action, Omission, and the Stringency of Duties' (1994) 142 U Pa L Rev 1493 at 1496.

⁸⁸ Lamond, above n. 83 at n. 35.

⁸⁹ Williams, above n. 1 at 88.

⁹⁰ [1998] Crim LR 830.

⁹¹ Freeman, above n. 84 at 1478.

⁹² Ibid.

⁹³ Ibid. at 1487.

⁹⁴ J. Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759 at 764.

⁹⁵ [1893] 1 QB 450.

⁹⁶ G. Hughes, 'Criminal Omissions' (1957) 67 Yale LJ 590 at 621.

⁹⁷ See, e.g., *Kent v London Ambulance Service* [1999] Lloyd's Rep 424 at 453.

⁹⁸ *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82.

⁹⁹ [2003] QB 1207.

¹⁰⁰ Ibid. at [30].

¹⁰¹ Moore, above n. 9.

¹⁰² Freeman, above n. 84.

¹⁰³ Ashworth has observed: 'All types of offence vary in their seriousness, of course, and even if it were true that on the whole omissions are less culpable than acts, it would not follow that omissions are less suitable for criminal prohibition than acts': Ashworth, above n. 1 at 425.

¹⁰⁴ Williams, above n. 1.

¹⁰⁵ See I. Kennedy, 'Switching Off Life Support Machines: The Legal Implications' [1977] Crim LR 443; H. Beynon, 'Doctors as Murderers' [1982] Crim LR 17; D. Price, 'Fairly Bland: An Alternative View' (2001) 21(4) *Legal Studies* 618; J. Keown, 'Restoring the Sanctity of Life' (2006) 26(1) *Legal Studies* 109; D. Price, 'My View of the Sanctity of Life: A Rebuttal of John Keown's Critique' (2007) 27(4) *Legal Studies* 549; P. Singer, *Rethinking Life and Death* (Oxford University Press: Oxford, 1995) 195; J. Bennett, *The Act Itself* (Clarendon Press: Oxford, 1995).

¹⁰⁶ *Airedale NHS Trust v Bland* [1993] AC 789.

¹⁰⁷ G. Mead, 'Contracting into Crime: A Theory of Criminal Omissions' (1991) 11(2) OJLS 147 at 148; J. Kleinig, 'Failures to Act' (1986) 49 *Law and Contemporary Problems* 162 at 165. See also J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press: New York, 1984) 161.

¹⁰⁸ G. Fletcher, 'On the Moral Irrelevance of Bodily Movements' (1994) 142 U Pa L Rev. 1443 at 1444.

¹⁰⁹ M. Corrado, 'Is There an Act Requirement in the Criminal Law?' (1994) 142 U Pa L Rev 1529 at 1533.

¹¹⁰ Ashworth, above n. 1.

¹¹¹ Ibid. at 425. See also Hughes, above n. 96 at 626.

¹¹² G. Fletcher, *Rethinking Criminal Law* (Little Brown: Boston and Toronto, 1978) 613.

¹¹³ Williams, above n. 1.

¹¹⁴ B. S. Markesinis, 'Negligence, Nuisance and Affirmative Duties' (1989) 105 LQR 104 at 112.

¹¹⁵ Contained in the Serious Crime Act 2007, Part 2.

¹¹⁶ *R v Hogan* (1851) 5 Cox CC 255, *R v Chandler* (1855) 6 Cox CC 519 and *R v Bubb and Hook* (1850) 4 Cox CC 455, discussed by A. Smart, 'Responsibility for Failing the Impossible' (1987) 103 LQR 532 at 535-7.

¹¹⁷ Unreported, 16 October 1998.

¹¹⁸ Quoted in *R v Kenneth Hood* [2004] 1 Cr App Rep (S) 73 at [10].

¹¹⁹ [1995] AC 171.